

CIVIL DIVISION

The Civil Division is responsible for all civil litigation in Federal District Court, District of Arizona, and Arizona State Courts in which the United States and its interests, or that of its agencies and employees, are involved. Presently, the Civil Division is staffed by 15 Assistant United States Attorneys. Five of those attorneys work in the Affirmative Civil Enforcement Section where the United States is a plaintiff prosecuting cases on its behalf to secure monetary, injunctive or other affirmative relief. The remaining ten attorneys are assigned to the Defensive Section defending actions brought against the United States, its agencies or its employees.

For purposes of this report, most civil litigation involving Indian Country arises under the Federal Tort Claims Act ("FTCA"), principally due to the Congressional extension of FTCA coverage to Tribes, tribal organizations and/or tribal employees under the Indian Self-Determination Act ("ISDA") and the Tribally Controlled Schools Act of 1988.

Many Arizona tribes, including the Navajo Nation, the White Mountain Apache Tribe, the San Carlos Apache Tribe, the Salt River Indian Tribe and the Gila River Indian Tribe, have contracted with the Bureau of Indian Affairs ("BIA") to provide law enforcement and detention services. Many of the BIA funded schools have elected to become grant schools. Although the Indian Health Services ("IHS") continues to provide medical care for Native Americans on Indian Reservations, some tribes are considering self-determination contracts with the IHS to provide these services.

Federal law provides that certain tort claims, resulting from the performance of former BIA and IHS functions such as law enforcement, inmate detention or the provision of health services by an Indian tribe, tribal agencies and their employees, operating under a contract or compact, grant agreement, or any other agreement with the BIA or the IHS, must be filed as an action against the United States under the FTCA. Similarly, common law tort actions arising from education services provided by former BIA funded schools which elect to become a grant school pursuant to a contract with the BIA must be filed as an action against the United States under the FTCA.

Litigation of such common law negligence actions has involved novel issues. For example, does the tort law as developed by the state apply or does tribal law control. Compare *Bryant v. United States*, 147 F. Supp. 2d 953 (D.Ariz. 2000)(Arizona state law controls) with *Cheromiah v. United States*, 55 F. Supp. 2d 1295 (D.N.M. 1999)(tribal law controls). Another significant issue involves whether a Tribe or tribal organization's private insurance policy covers and can be responsible for pay-



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ment of tort liability damages arising from the performance of ISDA compacts or contracts (Section 638 activities) or stemming from FTCA - covered school negligence cases under the Tribally Controlled Schools Act of 1988. See *United States v CNA Financial Corporation*, 168 F. Supp. 2d 1109 (D.Alaska 2001)(holding that the United States was an implied insured under the tribal corporation's liability policy). A different and difficult issue exists under the "federal law enforcement officer" exception to suit under the FTCA [28 U.S.C. § 2680(h)]; that is, when and to what extent does the performance of law enforcement activities by tribal law enforcement officers under ISDA Section 638 contracts fall within the exception, thus preventing recovery by an injured plaintiff. Additionally, are there circumstances where the tribal employee's acts or omissions, serving as the basis of a negligence suit, are so far outside the course and scope of the employee's duties so as to be beyond the coverage of the FTCA. See *Red Elk v. United States*, 62 F.3d 1102 (8th Cir. 1995)(United States liable under FTCA for damages due to tribal police officer's rape of thirteen year old); *Buchanan v. U.S. Department of Health and Human Services*, 177 F. Supp. 2d 1105 (N.D. Cal. 2001) (United States could be held liable for motor vehicle accident involving a Guidiville Indian Rancheria tribal administrator who was transporting her son to a court-ordered drug test in a government vehicle, even though the United States asserted that the tribal administrator's duties did not include such transportation activities). Finally, under what circumstances can the United States argue that injuries at Indian gaming-related activities should be compensated by the Tribes themselves (or through their insurance) under a Tribal waiver of sovereign immunity under Indian Gaming compacts.

The above-stated issues, difficult enough by themselves, arise in the context of ordinary negligence cases. Increasingly, common law negligence theories are coupled in the same complaint, or in a parallel Tribal Court action, with monetary recovery sought from a tribal employee in his or her personal capacity. Because the United States' current position is that the "deemed federal employee" status accorded under the ISDA Section 638 or Tribally controlled Schools Act of 1988 statutes does not apply to actions based upon asserted violations of constitutional law, troublesome issues arise as to individual representation of tribal employees in such situations. Once again, the United States' current position is that such representation must be accomplished by the tribal government, the tribal government's liability carrier or, perhaps, private counsel retained by the individual defendants or through the individual's insurance carrier.

The U.S. Attorney's Office remains committed to the representation of tribes, their agencies, and employees in FTCA litigation. As part of its representation, the United States Attorney's Office continues to provide training programs to meet the needs of tribal police department, detention facilities and the grant schools. Contact AUSA Arthur G. Garcia at (602) 514-7745 or art.garcia@usdoj.gov for additional information.



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GAYMAN v. COLORADO RIVER INDIAN TRIBE ET. AL.

The plaintiff is a non-Indian who claimed that he was falsely arrested and assaulted by employees of the Blue Water Resort and Casino. The plaintiff sued the Colorado River Indian Tribe (“CRIT”) because the Blue Water Resort and Casino are a wholly owned and operated enterprise of the Tribe. Because the defendant employees include an off-duty Colorado River Indian Tribe Police Department officer, the plaintiff also sued the Chief of Police for negligent training and supervision of the off-duty officer. Since the CRIT Police Department operates under an Indian self-determination contract with the Bureau of Indian Affairs (BIA) and the Chief of Police was acting within the contract, the United States was substituted for the Chief of Police as the defendant. The two primary issues before the district court are (1) the scope of a waiver of Tribal sovereign immunity in the State-Tribal Gaming Compact and (2) the scope of Federal Tort Claim Act (FTCA) coverage of the self-determination contract (commonly known as Section 638 contracts).

ADLEY v. VICTOR ET. AL.

The plaintiffs, the mother and daughter of the deceased, sued the United States and the San Carlos Police officer, for the negligent use of deadly force and the officer individually for violations of the constitutional rights of the deceased. Since the tribal police officer was acting within the scope of the Section 638 contract with the Bureau of Indian Affairs, the United States was substituted for the police officer as to the cause of action alleging negligence. In the constitutional tort action, the Tribal officer is represented by counsel hired by Tribal insurance. The defendant officer has moved to dismiss the constitutional tort action because (1) the plaintiffs have failed to exhaust their Tribal court remedies, (2) there is no federal constitutional tort action since the Tribal officer was enforcing Tribal law against a Tribal member on Tribal land and finally (3) only the Indian Civil Rights Act provides a remedy for violations of constitutional rights of Native-Americans on reservations and only the Tribal court has jurisdiction over Indian Civil Rights Act suits. The United States contends that the officer was justified in the use of deadly force under the circumstances of this case.

LINNEEN v. GILA RIVER INDIAN COMMUNITY ET. AL.

The plaintiffs, trespassers on the Gila River Indian Reservation, sued the United States alleging that the United States has supervisory power over the Gila River Indian Community, a BIA officer in his individual capacity and Gila River Community Tribal Ranger alleging negligence and violations of their constitutional rights in their detention by the Tribal Ranger for trespassing. In a companion case, the plaintiffs sued the Indian Community and its officer in their official capacity. That case was dismissed on the grounds of no



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waiver of Tribal sovereign immunity. The defendant United States contends that the United States did not have supervisory authority over the Gila River Indian Community; the BIA officer did not detain the plaintiffs and he did not supervise the Tribal ranger. The defendant BIA officer contends that he did not violate their constitutional rights. The defendant Tribal Ranger contends that the plaintiffs failed to exhaust their Tribal court remedies or the Tribal court dismissal is *res judicata*, and there is no federal constitutional tort action since he was enforcing Tribal law.